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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re T.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. T.G., Defendant and Appellant.	A126454 (Contra Costa County Super. Ct. No. J08-00636)

Appellant T.G. appeals from a jurisdictional order sustaining charges that he participated in the commission of an armed robbery and attempted to dissuade the victim from testifying against him. Appellant contends his confrontation clause rights were violated by the admission of testimony recounting out-of-court statements made by the victim to law enforcement officers. We find no constitutional violation, and affirm the judgment.

I. BACKGROUND

An amended supplemental wardship petition filed on August 20, 2009, alleged that appellant committed felony violations of (1) Penal Code section 211/212.5, subdivision (c) (second degree robbery) by taking the personal property of Miguel G. by means of force and fear on or about January 3, 2009; and (2) Penal Code section 136.1, subdivisions (a)(2) and (c)(1), by attempting to dissuade Miguel G. from giving testimony against him. The robbery charge included enhancement allegations pertaining

to appellant's personal use of a firearm. A contested jurisdiction hearing began on August 27, 2009.

A. *Jurisdiction Hearing*

1. *Victim's Testimony*

Miguel lived with his mother in an apartment on Sycamore Drive in Antioch in January 2009. T.G. lived across the street from Miguel. The two ran into each other often and were on friendly terms. Miguel referred to T.G. by his nickname, "R."[1]

On the evening of January 3, 2009, T.G. called Miguel on his cell phone and told Miguel to meet him on Spanos, a nearby street, to go to a party. T.G. had never previously invited Miguel to a party. Miguel rode his bike to Spanos Street. When Miguel got to Spanos, T.G. was not there. Miguel called T.G. back on his cell phone but got no answer. When he was about to leave to go home, a friend of T.G.'s, Matt, called Miguel's cell phone and told him to come to Dogwood Way, another nearby street that intersected Sycamore Drive. When he got to Dogwood, Miguel saw four people standing together near Dogwood and Sycamore. He noticed two of the people were putting on black hoodies handed to them from the other people in the group.[2]

One member of the group walked up to where Miguel was standing with his bike. Miguel recognized him as Matt's cousin. The two of them took a couple of steps toward Sycamore when they were approached by a Black male with his hair in shoulder-length "dreads" and a gold "grill" in his mouth.[3] The male with dreads pointed a black handgun at Matt's cousin, which Miguel believed was a nine-millimeter gun, and robbed him of some money. Matt's cousin did not appear to be afraid of the robber, and Miguel testified the robbery was a "fake." While the first apparent robbery was going on, Miguel started to leave on his bike. He stopped when the man in dreads fired a shot with his gun in the air and told him to stay there.

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[1] "R." is used in lieu of T.G.'s actual nickname.

[2] Hoodies are sweatshirts with hoods.

[3] Miguel explained that a grill is a denture containing gold teeth that is slipped over the wearer's real teeth.

Miguel testified that immediately after the robbery of Matt's cousin, he was robbed by the man with the dreads and by an accomplice who also pointed a handgun at Miguel. One of the robbers struck Miguel's face with his gun. Together, they took his cell phone and his wallet containing cash and identification. They also made him take off his pants and shoes, before letting him ride away on his bike. When the prosecutor asked Miguel to identify the second robber, Miguel claimed he no longer remembered who the second person was.

The prosecutor got Miguel to admit that when questioned by police on the night of the robbery, he had (1) identified T.G. as the second robber, (2) provided a physical description of the second robber and description of his clothes that matched T.G. when he was apprehended a short time later, (3) pointed out T.G. as the second robber to police when he spotted him walking in the neighborhood that night, and (4) had been truthful with police when he described the incident and identified the second robber.

Pressed by an openly skeptical prosecutor to explain his inability to identify T.G. as the robber at the hearing, Miguel testified, "I don't know. I just don't remember. I got hit by a car and was in a coma for three days." Miguel could not remember when the accident happened except that it was after he was robbed.[4] The prosecution sought to develop a different theory to explain Miguel's lapse of memory—his fear of T.G. taking retribution against him or his family for testifying against him. Miguel admitted that T.G. had called him and threatened him approximately three times since the robbery, and that friends of T.G. had also threatened him on the telephone and in person. He claimed he no longer remembered most of what T.G. had said to him in their conversations, and could not even remember his recent conversations with prosecution investigators in which he had described the threats made against him. He did remember T.G. telling him

[4] On cross-examination by T.G.'s counsel, Miguel stated he was hit by a car while riding his bicycle and he spent three days in the hospital and was in a coma for two of those days due to a head injury. He thought the accident might have occurred a month or a month and a half after the robbery. Miguel testified he had no personal recollection of the accident itself. No medical records or other evidence was introduced to substantiate this testimony.

in one conversation approximately a month before the trial to call T.G's attorney and tell him that he did not do it. Miguel also admitted he was "scared to death to testify." When asked why he was scared, Miguel would only say, "Just 'cuz."

2. *Other Prosecution Testimony*

Meghan Miller was a sworn police officer for the City of Antioch when she was dispatched to the area of Sycamore Drive to make contact with Miguel G. and his mother and stepfather on the evening of January 3, 2009, following a report of the robbery. When the prosecution began to question Officer Miller about Miguel's statements to her on that evening, defense counsel objected, citing two grounds—the hearsay rule and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).[5] The court overruled the defense's objections, finding that (1) because Miguel's claim of memory loss was not credible, Miller's testimony about statements Miguel made to her came under the exception to the hearsay rule for prior inconsistent statements; and (2) *Crawford* did not apply because Miguel was available for cross-examination at trial.

Miller confirmed that on the night of the robbery, Miguel (1) gave her a physical description of the second robber that matched T.G. when he was apprehended; and (2) identified his acquaintance, "R.," as the second robber. Miller also corroborated Miguel's testimony about the cell phone calls he had received and placed on the night of the robbery. She testified that the cell phone seized from T.G. when he was arrested showed it had been used to place calls to Miguel's cell phone earlier that evening, and that Miguel placed one unanswered call to T.G.

Officer Christopher Walters testified that on the night of the robbery he drove slowly around the neighborhood with Miguel in his patrol car. Over appellant's hearsay and *Crawford* objections, Walters testified that when they saw T.G. walking on the

[5] *Crawford*, further discussed *post*, held the confrontation clause of the Sixth Amendment bars evidence of out-of-court testimonial statements made by a witness who is unavailable to be cross-examined at trial, unless the defendant had a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at pp. 51, 53–54.)

sidewalk, Miguel pointed at T.G. and told Walters, "That's one of the guys that robbed me."

Over the defense's hearsay objection, prosecution investigator, Renier Hernandez, was allowed to testify about her interview of Miguel G. in August 2009, in which Miguel described a threatening telephone call he had received from T.G.[6] Miguel told Hernandez that T.G. told him to speak to his defense attorney and tell him he was not involved in the robbery. During the conversation, T.G. also told Miguel the coconspirator in the case "was taken care of," and that one of Miguel's friends had been shot in Pittsburg. Miguel understood from the conversation that T.G. did not want him to testify and that T.G.'s friends would either leave Miguel alone or not, depending on what he did in T.G's case.

The parties stipulated that Detective Castillo of the Antioch Police Department would testify if called that (1) he spoke with Miguel by telephone on January 5, 2009; (2) he read to Miguel the statement that Miguel had given to Officer Miller on the night of the robbery; and (3) Miguel confirmed the accuracy of the statement with the exception that "R." had the .22-caliber gun and the other assailant had the nine-millimeter gun.

3. *Defense Case*

The defense offered no testimony or evidence of its own. Defense counsel argued in closing that Miguel was lying throughout his testimony, including when he claimed he could not remember key facts. Counsel pointed out that Miguel repeatedly contradicted himself by claiming lack of memory in response to some questions and then giving specific responses to the same questions when they were rephrased slightly. The defense also questioned why T.G. would rob someone who could easily identify him.

4. *Court Findings*

The court found Miguel (1) was "very fearful" and "very, very reluctant to testify in this case"; (2) was "mostly untruthful" when he stated could not remember various

[6] The defense interposed no *Crawford* objection to Hernandez's testimony.

facts, as shown by his substantive responses when the same question was asked in a different way; and (3) "did everything he could not to name [appellant]," but was "not a very artful liar." It found beyond a reasonable doubt that appellant did commit the robbery and did call the victim to threaten him. The court also found the enhancement allegations true.

B. *Disposition and Appeal*

The court ordered appellant committed to the Division of Juvenile Justice of the Department of Corrections and Rehabilitation for a maximum period of confinement of eight years. This timely appeal followed.

II. DISCUSSION

Appellant contends Miguel's out-of-court statements to police should have been excluded under *Crawford* because Miguel was "functionally unavailable" for cross-examination at trial due to his asserted memory loss. We are not persuaded.

To support his claim of functional unavailability, appellant cites Evidence Code section 240,[7] and cases such as *People v. Alcala* (1992) 4 Cal.4th 742 (*Alcala*), in which the prosecution was allowed to use the former testimony of witnesses under Evidence Code section 1290 et seq. when it established that, due to mental infirmity, the witness no longer possessed any recollections relevant to the case. (*Alcala*, at pp. 778–779.) Appellant merely assumes, without citation of authority, that the standard for admitting the former testimony of a reluctant or forgetful witness in lieu of the witness's live testimony is the same as that for determining when a witness is unavailable for confrontation clause purposes. Case law in fact suggests the two standards are not to be equated.

[7] Section 240 provides that for purposes of the Evidence Code, a person who has made statements in a prior proceeding may be deemed to be "unavailable as a witness" in the current proceeding on the grounds, among others, that he or she is "unable to . . . testify at the hearing because of [a] then existing physical or mental illness or infirmity." (Evid. Code, § 240, subd. (a)(3).)

In *People v. Perez* (2000) 82 Cal.App.4th 760 (*Perez*), the Court of Appeal rejected virtually the identical argument appellant raises here: "Aguilar contends the professed memory loss made Gutierrez 'unavailable as a witness,' implying . . . Aguilar was unable to confront the witness. This argument takes out of context language from cases which construed 'unavailable as a witness' in Evidence Code section 240, subdivision (a) . . . . [Citations.] *These situations are not the same as here, where the witness actually testified at trial, was subjected to lengthy actual cross-examination, and the loss of memory was feigned and evasive. In this latter situation, the witness was available for cross-examination within the meaning of the confrontation clause*." (*Id.* at p. 767, fn. 2, italics added.) *Perez* went on to point out that the United States Supreme Court rejected a similar argument in *United States v. Owens* (1988) 484 U.S. 554 (*Owens*): "It said there was no fatal contradiction under the Federal Rules of Evidence that a witness with genuine memory loss could be found 'subject to cross-examination' for the purpose of one evidence rule, while at the same time be found 'unavailable as a witness' for the purpose of a different evidence rule. '[T]he two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.' (*Id*. at p. 564.)" (*Perez*, at p. 767, fn. 2.)

Even setting *Perez* and *Owens* aside, appellant's unavailability argument would still fail. He contends the court erred by failing to further investigate Miguel's story of a head injury resulting in memory loss. In *Alcala*, the Supreme Court rejected the argument that expert testimony was required in order to evaluate a witness's claim of memory loss and instead held that the trial court was entitled to determine the genuineness of the claim based on its own observations of the witness's demeanor and responses to questions. (*Alcala, supra*, 4 Cal.4th at pp. 779–782.) In this case, the trial court, the prosecution, *and the defense itself* all came to the conclusion that Miguel's claim of memory loss was fabricated. Substantial evidence supports their unanimous conclusion. That evidence includes (1) the highly selective quality of Miguel's memory lapses, (2) the frequency with which he could recall information he previously claimed to have forgotten when the question put to him was rephrased, (3) the inherent improbability

of Miguel's story that he was released from the hospital the day after awakening from a two-day coma, and (4) Miguel's own admissions T.G. had threatened him and tried to dissuade him from testifying. No further investigation of the claim was required on this record.

The Supreme Court's decision in *Crawford* does not change the analysis. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.] . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

Here, Miguel testified in great detail about the night of the robbery, including the robbery itself and the events that occurred before and after it. He described his movements on the night in question and the cell phone calls he received and placed. He described the first robber's appearance, including the color, caliber, and type of handgun he used, with great specificity. He recalled the words spoken to him by the first robber and the specific items of personal property taken from him. He remembered what he told police after the robbery. Among the material facts pertinent to the robbery, appellant's claimed memory loss was limited to only one— the second robber's identity. He was cross-examined at length on all aspects of his testimony. We fail to see how appellant's confrontation clause rights were impaired in any degree by Miguel's claim of selective memory loss. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.)

"Although the right of confrontation requires that an accused receive 'an adequate opportunity to cross-examine adverse witnesses' ([*Owens, supra,*] 484 U.S. 554, 557), it does not protect against testimony that is ' "marred by forgetfulness, confusion, or evasion" ' (*id*. at p. 558, quoting *Delaware v. Fensterer*[, *supra,*] 474 U.S. 15, 21)." (*People v. Cudjo* (1993) 6 Cal.4th 585, 622.) The rule recognized in *Owens* and *Cudjo* that a witness's claimed partial memory loss at trial does not in itself preclude constitutionally adequate cross-examination continues to be good law after *Crawford*.

(See *United States v. Ghilarducci* (7th Cir. 2007) 480 F.3d 542, 548–549 [rejecting the defendant's *Crawford* argument that he was denied effective cross-examination due to the witness's lack of memory regarding his prior statement]; *United States v. Bliss* (2d Cir. 2006) 188 Fed.Appx. 13 [because witness was available for cross-examination at trial regarding his grand jury testimony there was no confrontation clause violation notwithstanding witness's loss of memory]; see also *Yanez v. Minnesota* (8th Cir. 2009) 562 F.3d 958, 964; *Richey v. Trombley* (E.D.Mich. Feb. 18, 2009, No. 05-CV-74073) 2009 U.S.Dist. Lexis 11982.)

Appellant's confrontation clause rights under the state and federal Constitutions were not violated by the admission of testimony recounting Miguel G.'s statements to law enforcement identifying him as a participant in the robbery and reporting his attempts to dissuade Miguel from testifying. Miguel was present and available for cross-examination on both subjects at the jurisdictional hearing.[8]

III. DISPOSITION

The judgment is affirmed.

_____
Margulies, Acting P.J.

We concur:

_____
Dondero, J.

_____
Banke, J.

[8] We also agree with the Attorney General that appellant forfeited his *Crawford* claim as to the testimony of Renier Hernandez by failing to timely raise it in the trial court. A defendant's statutory hearsay objection does not preserve his confrontation clause claim under *Crawford* for appellate review. (*People v. Chaney* (2007) 148 Cal.App.4th 772, 779–780.)